United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 30, 2005

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: CGM Contractors, Inc.
Case 4-CA-33474 590-7575-2500
590-7587

The Region submitted this 8(a)(5) case for advice as to whether the parties' contract language and extrinsic evidence regarding events surrounding the execution of the contract are sufficient to overcome the presumption that the Union and the Employer's relationship was governed by Section 8(f). The Region also sought advice as to whether, regardless of the nature of the collective bargaining agreement, was the Employer obligated to maintain a bargaining relationship with the Union either because the initial contract automatically renewed, or because of a successor clause in the master agreement negotiated by the Union and a multi-employer association to which the Employer did not belong.

We conclude that the Employer did not violate Section 8(a)(5) as alleged. The relevant contract language, alone, does not establish a Section 9(a) relationship between the parties, and the events surrounding the agreement are insufficient to overcome the presumption that the Employer's relationship with the Union is governed by Section 8(f). We further conclude that the Employer was not otherwise required to recognize and bargain with the Union; the Union and the Employer each took action that forestalled the automatic renewal of the agreement, and the master agreement's successor clause did not apply to the Employer.

FACTS

Background

CGM Contractors, Inc. (the Employer), is a small, family-owned paving contactor doing business in and around Quakertown, PA. The Employer's owner and president is Chuck Reese. Chuck Reese's sons Mark and Greg also work for the Employer; Mark is the Employer's financial officer and estimator, Greg is a foreman and equipment operator. The

Employer employs several employees as foremen or operators, field employees or laborers, drivers, and surveyors.[1]

Operating Engineers, Local 542 (the Union), attempted in Spring 2003 to organize the Employer using Union salts. When the Employer unlawfully refused to hire or consider for hire the salts because of their support for, or membership in, the Union, the Region issued complaint on two related Union-filed charges. The Union withdrew its charges after it executed a "me-too" collective bargaining agreement with the Employer shortly before the scheduled trial date.

The Union claims that by executing the me-too agreement, the parties created a collective bargaining relationship governed by Section 9(a) and, therefore, the Employer was not free to repudiate that relationship without evidence that the Union did not have majority support. In the alternative, the Union claims that, if the relationship were governed by Section 8(f), the Employer would be bound to the master agreement by the automatic renewal and successor clauses.

The Employer And The Union Agreed To A Contract As Part Of A Non-Board Settlement

In late June 2003, Union business agents Frank Bankard and Gary Mostek approached Chuck Reese about settling the salting cases, which were scheduled for trial in early July, 2003. During their 20 – 30 minute meeting, Bankard and Mostek told Reese that the Union would withdraw its charges if the Employer signed a Union contract. Reese rejected the Union's offer, saying he would go out of business if he had to pay the estimated $90,000 to $100,000 in backpay that the Union claimed it was owed.[2] The Union representatives told Reese that the Union did not want his money. Bankard then pointed to employees Ron Zito and Ken Lindaberry working in the yard and told Reese that the Union merely wanted to represent certain "key operators," Union members and supporters already working for the Employer. Bankard claims that Reese said that he knew Zito and Lindaberry were Union men, but Reese denies making any such statement. Reese then

[1] It is unclear how many employees the Employer might employ in each category throughout the year. The Region estimates that the Employer usually employs two or three non-family operators, and might employ four to six laborers at any time, depending on the job.

[2] The Region has estimated that backpay might have been $60,000.

told Bankard and Mostek to talk to his son Mark, who handled financial matters.

At no time during the June meeting did Bankard claim that Zito and Lindaberry had signed Union authorization cards.[3] It is also unclear whether Zito and Lindaberry were in the yard during the conversation Bankard claims he had with Reese, as the Employer's payroll records show that both Zito and Lindaberry were off work for the week surrounding the alleged conversation. Finally, Lindaberry was then employed as a mechanic and it is therefore unclear whether the Union considered him to be one of the "key operators" that it sought to represent.

Bankard and Mostek met with Mark Reese on or about June 29 or June 30 at a local diner.[4] Mark and the Union representatives reviewed the contract, and Mark expressed his concerns with certain provisions. Bankard told Mark to write down all of his concerns and let the Union agents know what the Employer needed to reach an agreement. Later that day or the next day, Mostek met with Mark in Mark's office to discuss the proposed contract further. Shortly after that meeting, Mark communicated his remaining contract concerns to Bankard by telephone and then by e-mail.

The parties ultimately resolved the Employer's concerns on June 30, 2003, by executing a "me -too" agreement, referred to as "Concessions Addendum 'A,'" whereby the Employer agreed to apply the terms of the Union's master agreement, as modified and/or clarified by the concessions addendum. The Employer and the Union also signed a document, referred to as the "signature page," that contained language describing the Employer's recognition of the Union as the employees' collective bargaining representative.

Relevant Terms Of The Master Agreement, The Me-Too Agreement, And The Concessions Addendum

The master agreement, the me-too agreement, and the concessions agreement all contain language relevant to the nature of the parties' bargaining relationship and,

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[3] The Union has advised the Region that it cannot be sure that it ever had signed authorization cards from any CGM employee.

[4] Mostek claims that he met with Mark in the Employer's offices three times over the course of one month, and that a meeting took place on June 30 at the Employer's offices.

therefore, the scope of the Employer's obligation to recognize and bargain with the Union.

The signature page contained the following recognition language that the parties agreed would replace the recognition language of the master agreement:

> The Union having requested recognitions [sic] as the Section 9(a) representative of the employees covered by this agreement and having demonstrated through authorization cards that it has the support of the employees to serve as such representative, the Employer hereby recognize [sic] the Union as the Section 9(a) representative for all persons performing work within the mechanical jurisdiction of the Union, whether or not any of such persons are members of the Union, provide [sic] that the provisions of this Section shall be subjected [sic] to the provisions of Article IV, Section I.

The concessions addendum explicitly addressed nine (9) issues, including the potential renegotiation or renewal of the concessions addendum and the me-too agreement. Specifically, at Item Number 2, the parties agreed "That, [sic] this Addendum/Agreement can be renegotiated or renewed per CGM's request. (*After the April 30, 2004 trial period is over*)" (emphasis in the original).

The master agreement's evergreen clause provided:

> The Agreement shall be binding upon the parties hereto retroactively from May 1, 2000 to April 30, 2004, and thereafter from year to year for one year periods, unless and until either party to this Agreement shall give the other sixty (60) days' notice, in writing, prior to May 1, 2004, or prior to the expiration date of any year thereafter, or its intention to negotiate changes in the Agreement.

Finally, the successor clause reads, in relevant part:

> When the Union advises the Employer in writing that this contract is about to expire, and requests a meeting to negotiate a new contract, the Employer hereby agrees that, whether he [sic] is a member or not, the Employer will be bound by the contract to be entered into between the Union and the Association . . . unless a separate contract is agreed between the Employer and the Union."

The Parties' Post-Execution Conduct

The Employer irregularly applied the terms of the master agreement. For example, the Employer paid employees the contractual wages for a September 2003 job, but failed to make timely benefit fund contributions on the employees' behalf.[5] The Employer applied the contract to another large project only after the Union picketed the Employer at the job site; for that job the Employer arranged for the general contractor to make contributions to the benefit funds on the employees' behalf. There is no evidence that the Employer applied the contract to any other job.

By form letter dated January 30, 2004, the Union advised each signatory employer that the Union wanted to meet to discuss terms and conditions of a new collective bargaining agreement to replace the employers' then-current agreements with the Union. The Employer did not directly respond to the form letter.

After submitting this case for advice, the Region obtained a copy of a letter from the Employer to the Union dated February 12, 2004, wherein the Employer advised the Union that it intended to terminate its relationship with the Union upon expiration of the trial period referenced in the concessions addendum. There is no evidence that the Union responded to the Employer's letter. About this time, the Employer indicated through its responses to earlier inquiries from the Union's pension fund that it had gone out of business.[6]

Prior to the expiration of the master agreement, the Union negotiated a successor agreement with the multi-employer associations. The successor agreement is effective by its terms from May 1, 2004 through April 30, 2006.

After the Employer sent its February 12 letter, the parties did not have any contact until August 2004. On that occasion, Union representatives discovered the Employer working on a job near Quakertown with employees not referred from the Union hiring hall as required by the successor association agreement. The Union, therefore, filed the

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[5] The Employer later sent two checks to cover the delinquent benefit fund contributions, but those checks bounced. The Union pension fund later filed a Section 301 suit against the Employer, winning a default judgment.

[6] Also about this time the Employer filed for bankruptcy; those proceedings, including the Employer attempts to reorganize, are ongoing.

instant charges alleging that the Employer had unlawfully repudiated the successor agreement.

ACTION

The Region should dismiss the charge, absent withdrawal. The relevant contract language, alone, does not establish a Section 9(a) relationship between the parties, and the events surrounding the agreement are insufficient to overcome the presumption that the Employer's relationship with the Union is governed by Section 8(f). We further conclude that the Employer was not otherwise required to recognize and bargain with the Union; the Union and the Employer each took action that forestalled the automatic renewal of the agreement, and the master agreement's successor clause did not apply to the Employer.

A. The Employer's Relationship With the Union Was Governed By Section 8(f) Rather Than 9(a)

There is a significant difference between a union's representative status in the construction industry under Section 8(f) and under Section 9(a) of the Act. Under Section 8(f), an employer may terminate the bargaining relationship upon expiration of the agreement.[7] Under Section 9(a), an employer must continue to recognize and bargain with the union after the agreement expires, unless and until the union is shown to have lost majority support.[8]

In the construction industry, there is a rebuttable presumption that a bargaining relationship is a Section 8(f) relationship,[9] therefore, a party asserting the existence of a 9(a) relationship has the burden of proving it.[10] The Board has held that it is possible for a party to meet its burden through contract language alone.[11]

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[7] See, e.g., Staunton fuel & Material d/b/a Central Illinois Construction, 335 NLRB 717, 718 (2001).

[8] Id.

[9] John Deklewa & Sons, 282 NLRB 1375, 1385 n. 41 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

[10] Central Illinois, 335 NLRB at 721.

[11] Id., 335 NLRB at 717. But see Nova Plumbing, Inc. v. NLRB, 330 F.3d 531, 536-538 (D.C. Cir. 2003), denying enf. of 336 NLRB 633 (2001)(contract language alone did not establish a Section 9(a) relationship where evidence showed unit employees resisted union representation).

In Central Illinois,[12] the Board adopted the Tenth Circuit's three-part test to determine whether contract language alone was sufficient to establish a Section 9(a) relationship.[13] Thus, to overcome the presumption that a bargaining relationship in the construction industry is governed by Section 8(f), the Board requires contract language that unequivocally indicates (1) that the union requested recognition as the majority or 9(a) representative of the unit employees, (2) that the employer recognized the union as the majority or 9(a) bargaining representative, and (3) that the employer's recognition was based on the union having shown, or having offered to show, that the union had the support of a majority of unit employees.[14] The agreement need not contain specific terms or "magic words," however, the contract language should accurately describe events that would independently establish the creation of a 9(a) relationship.[15] Where the contract language is not "independently dispositive," the Board will "consider relevant extrinsic evidence" to determine whether a relationship is governed by Section 8(f) or 9(a).[16]

The recognition language of the "me-too" agreement here clearly satisfies the first two elements of the Central Illinois test; it does not satisfy the third element of the

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[12] 335 NLRB at 719-720.

[13] See NLRB v. Triple C Maintenance, Inc., 219 F.3d 1147, 1155 (10th Cir. 2000), enforcing 327 NLRB 42 (1998) and NLRB v. Oklahoma Installation Co., 219 F.3d 1160, 1164 (10th Cir. 2000), denying enf. of 325 NLRB 741 (1998).

[14] Central Illinois, 335 NLRB at 719-720.

[15] See, e.g., Pontiac Ceiling and Partition Co., 337 NLRB 120, 121 (2001) (contract language established 9(a) relationship where it reflected Union's presentation of signed authorization cards that supported the union's claim of majority support) and Saylor's, Inc., 338 NLRB 330, 330 (2002) (contract language sufficient to establish 9(a) relationship where it stated that union "submitted to the [e]mployer evidence of majority support"). But see, CAB Associates, 340 NLRB No. 171, slip op. at 7, fn. 5 & 6 (2003) (contract provision was insufficient to establish a 9(a) relationship where it stated that union merely "claimed," and the employer "acknowledged and agreed" that the union had the support of a majority of employees).

[16] Id. at 720, fn. 15.

test. The parties' agreement merely asserts that the Union "demonstrated through authorization cards that it ha[d] the support of the employees to serve as [their 9(a)] representative." That language, even assuming that it accurately describes an exchange between the Employer and the Union, does not unequivocally state that the Union showed, or offered to show the Employer that the Union had the support of a majority of unit employees.[17] Because the contract language is ambiguous and, therefore, not independently dispositive of whether the parties' created a Section 9(a) relationship, we must consider the relevant extrinsic evidence.

There is no extrinsic evidence here that would support the Union's claim that it and the Employer created a 9(a) relationship. The Union has not yet defined the scope of the bargaining unit that it seeks to represent, nor defined which employees might have been within that unit when it executed the me-too agreement with the Employer. Moreover, the Union admits that it has never showed or offered to show the Employer proof that had the support of a majority of unit employees. Indeed, the Union has not even been able to produce evidence that it secured a signed authorization card from any unit employee prior to executing the me-too agreement with the Employer. In these circumstances, the Union has failed to overcome the presumption that its relationship with the Employer was governed by Section 8(f).[18]

B. The Agreement Did Not Automatically Renew

We agree with the Region that the parties' agreement did not automatically renew. The Union forestalled any automatic renewal of the agreement when it requested in January 2004 to meet with the Employer to negotiate a successor agreement. The Employer, too, forestalled

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[17] See NLRB v. Oklahoma Installation Co., 219 F.3d at 1165 - 1166 and CAB Associates, above, 340 NLRB No. 171, slip op. at 7, fn. 5 & 6. See also, Classical Stairways, Inc., Case 32-CA-21531, Advice Memorandum dated November 18, 2004, and Northwest Industrial Contractors, Case 36-CA-9446 and Integrity Plus Plumbing, Case 36-CA-9353, Advice Memorandum dated January 30, 2004.

[18] See, e.g., San Antonio Control Systems, Inc., 290 NLRB 786, 786 fn. 1 (1988) (no 9(a) relationship where there was insufficient evidence that a majority of unit employees supported the union at the time of alleged recognition). See also, Classical Stairways and Integrity Plus Plumbing, Advice Memoranda cited at footnote 20, above.

automatic renewal of the agreement when it advised the Employer that it would terminate the contract, effective April 30, 2004. In addition, we conclude that the parties' explicit agreement that the agreement "[could] be renegotiated or renewed at CGM's request" and "[a]fter the April 20, 2004 trial period [ended]" would have independently precluded any automatic renewal of the agreement.

C. The Employer Is Not Bound To Any Successor Agreement

We finally conclude that the Employer is not bound to any successor agreement reached between the Union and the multi-employer association. The successor clause of the master agreement would bind "the Employer" to a "contract to be entered into between the Union and the Association . . . unless a separate contract is agreed between the Employer and the Union." The master agreement, however, explicitly defines "the Employer" as "present and future members" of the various contractors associations that executed the master agreement with the Union. At no time has CGM been a member of any of the signatory associations. Thus, confining the agreement to its precise terms, we conclude that the successor clause has no application in this case.[19]

In sum, the Employer's relationship with the Union was governed by Section 8(f) of the Act. The Employer lawfully terminated its relationship with the Union upon expiration of the contract; both parties took action to forestall automatic renewal of the agreement and the successor clause did not apply to the Employer. The Region should, therefore, dismiss the charge, absent withdrawal.

B.J.K.

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[19] See, e.g., GEM Management Co., Inc., 339 NLRB 489, 489 fn. 1 (2003) ("me too" agreements are to be strictly confined to their precise terms). Cf. HCL, Inc., 343 NLRB No. 95, slip op. at 2 (2004) (individual employer took extra-contractual affirmative action to bind itself to a successor agreement between the union and a multi-employer bargaining group to which the employer did not belong) and Cowboy Scaffolding, 326 NLRB 1050, 1051 (1998) (same).